1977

Thomas J. Thorley v. William R. Thorley : Reply Brief

Utah Supreme Court

IN THE SUPREME COURT

OF THE STATE OF UTAH

In the Matter of the Estate of)
)
LESTER R. THORLEY,
)
Deceased.

THOMAS J. THORLEY,

Plaintiff-Appellant,

vs.

WILLIAM R. THORLEY,

Defendant-Respondent.

FOR DEFENDANT-RESPONDENT:

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IN THE SUPREME COURT

OF THE STATE OF UTAH

IN THE MATTER OF THE ESTATE OF LESTER R. THORLEY, DECEASED.	Case No. 15350
THOMAS J. THORLEY, Appellant vs. WILLIAM R. THORLEY, Respondent.	

REPLY BRIEF

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STATEMENT OF FACTS

Since the substance of this Appeal is crucially centered on the facts, and inasmuch as Respondent has himself devoted a substantial portion of his brief thereto, the following will attempt to reconcile and clarify the apparent discrepancies.

Initially, however, contrary to the accusations made by Respondent on page 2, paragraph 2 of his brief, the introductory comments in Appellant's opening brief are to be found in substantial part in the allegations of the Contest, Item 6 of the Designation of Record on Appeal, Paragraphs VII and VIII. The accusation that Appellants are in some way attempting "to get before this Court many matters which are simply not disclosed in the Record" is indeed spurious and without foundation.

Secondly, after Respondent admonishes the Appellant for attempting to infuse these proceedings with unwholesome material not found in the Record, he proceeds to advise this Court that Appellant filed a Contest in California along with a Petition for Probate and that Decedent left his entire estate in Utah. The fact is that neither this Court, nor any court, has determined that these assets, now located in California, and under the charge of an administrator appointed by the California courts, has its situs in Utah. Further, the Contest in California was filed not by Appellant but Respondent. The allegations of that Contest were verified by Respondent herein on January 22, 1976.

Next, Respondent incorrectly remarks on page 4, paragraph 2 that Appellant in "proceedings filed in San Diego County" claimed the residence of Decedent to be San Diego, California or Cedar City

Utah. In fact, this allegation is found in the Contest file October 4, 1976 in the District Court of Iron County, State Utah, Paragraph II. Furthermore, whatever was done or has b accomplished in the courts of the State of California is not part of this Record, nor has it any bearing on the rulings s here to be reviewed. Respondent's connotation of the bi-stat proceedings as a "race to judgment", is again misleading and irrelevant.

The Respondent's recitation of facts concerning the numb times this matter has been set down for hearing and subsequ vacated or continued is founded totally on Findings and Concl prepared by Respondent and signed by the Court without any p review by Appellant to permit corrections on amendments as t or content. In fact the only trial settings which appear of in this case occurred on February 26, 1977 and March 8, 1977. The February trial setting was vacated by Stipulation of Resp (Item 8, Designation of Record) and the March hearing was vac due to the presiding judge's incapacity and only after Appell received less than ten (10) days' notice (Item 11, Designatio Record). There was never a setting in December, 1976 or Jan 1977 as Respondent would have this Court believe. When the C finally set the matter for hearing on May 23, 1977 (Item 12, Designation of Record), Appellant appeared ready to proceed a the trial proceeded.

But even if Respondent's recitation of facts is correct of the settings occurred over a period of only four (4) to f months, during which time the Court was well aware of the

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encountered in arranging witnesses from Southern California to be transported to Southern Utah, in a complicated case involving expert testimony on mental incapacity and a myriad of facts pertinent to substantiate the claims of fraud, duress and undue influence. Because the Decedent spent the last thirty (30) years of his life in California very much as a hermit, and executed the will in question only three (3) days after his arrival in Utah, the testimony of the California witnesses is instrumental to the prosecution of this claim.

After four (4) days of trial and seven (7) hours of jury deliberation, the jury returned special interrogatories and the Court entered its judgment. However, the Court also ordered the trial on the merits to proceed the following day, a Friday, and to reconvene on Monday, May 30, a national holiday (Memorial Day). The request for a continuance referred to by Respondent at the bottom of page 5 of his brief was denied, not granted by the Court. It was only after the Court decided it had failed to admonish the jury the preceding evening, that, on May 27, 1977, the matter was taken off calendar. This action was taken by the Court only after it had interrogated a number of jurors and discovered that they had indeed discussed the merits of the case amongst themselves. Contrary to the inference raised by Respondent, the Court's order was not made to accommodate Appellant. (Item 10, Respondent's Designation of Record, Paragraph 6).

The purported oral notification of the June 28, 1977 trial date is next discussed. With a self-serving yet completely unsubstantiated assertion, Respondent asserts that this Notice was orally

transmitted to Appellant's co-counsel, Mr. Park, on June 1, 1
To support this statement, Respondent refers to Mr. Park's ac
ledgement of that date in the reporter's transcript, Item 9 o
the Designation of Record. However, a complete recital of th
relevant portion of the transcript is devoid of any such conc

"MR. CHAMBERLAIN: I might state, your Honor, in connection with that trial setting, your Honor, my office received a telephone call prior to the time I received the formal jury trial setting from the Court Administrator, Clerk, setting the matter for trial, told me the date that it was set for trial, and that was approximately June 1st.

THE COURT: Mr. Park, did you receive similar notice?

MR. PARK: Yes, your Honor. My secretary called San Diego pursuant to the Court's instructions, I'm not sure what day it was, but I did receive a call."

Note that Mr. Chamberlain representing Respondent at that hearing could only give an approximate date while Mr. Park acknowledging receipt of such a call, does not affirm June 1st or any other date. As reflected in Paragraph 12 of the Statement of Facts in the opening brief, this call was made on June 13, not June 1. Interestingly enough, the trial court at the hearing provided no assistance in pinpointing this date. (See, Item the Respondent's Designation of Record). If Respondent is to believed, it is indeed curious that the trial court waited seventeen (17) additional days before mailing its written or on June 17, 1977 to counsel setting the matter for trial o

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June 28, 1977. [Inasmuch as the Certificate of Mailing from the Court was not present in the copy of the Designation of Record provided by this Court, I have attached a copy of that Order and the mailing certificate.]

I

FAILING TO GRANT THE REQUESTED TWO-WEEK CONTINUANCE AS AN ABUSE OF DISCRETION AND AS DENIAL OF DUE PROCESS.

As indicated above, Respondent's bold assertion on page 7 that there have been eight (8) settings and "many continuances", is totally unfounded. The facts recited in the trial court's Findings of Fact, Item 10 of the Respondent's Designation of Record, does not otherwise find support in the Record. Furthermore, these "settings" were not all concerned with the same proceeding. Rather, they involved settings for the Petition for Probate, a contest before probate as well as a contest after probate. Each stage of the estate proceedings must in all fairness be separately analyzed. Respondent, of course, would rather group them all together to raise the implication that the Appellants have been dilatory and derelict in their prosecution of this claim. It is submitted that if Respondent truly believed that Appellant was being dilatory, why then did he not move to dismiss this case at the trial court level. In addition, this Court may take judicial notice of the vigor with which this appeal is being prosecuted.

The filing of the Interlocutory Appeal on June 17, 1977, twenty (20) days after the Court's judgment upon the findings of the advisory jury, contrary to Respondent's contention was not unreasonable in view of the June 28, 1977 trial date. Recall first

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that the Court on May 3, 1977 denied Appellant's Motion for
continuance of the trial on the merits to pursue this interl
remedy following a determination of domicile. The same Moti
was made and denied on May 29, 1977 after the domicile trial.
importantly, the Findings and Conclusions were not entered by
trial court until June 3, 1977 and the Interlocutory Appeal wa
taken from the denial of additional Motions for a Stay and for
Mental Examination heard on June 7, 1977. Furthermore, under
Rule 72(b), Appellant is given thirty (30) days within which
his Petition in the Supreme Court. Utilizing ten (10) days in
view of these facts can hardly be deemed dilatory.

Recall also that Appellant's requested two (2)-week conti
of the trial date was not based solely on the Supreme Court's
denial of the Interlocutory Decree the day before trial as con
by Respondent on pages 7-9 of his brief. The Appeal was only
several reasons for requesting the brief interlude. The short
Notice of Trial together with renewed hope for the Court to
favorably rule on a Motion to Change Venue was also of primary
concern particularly in view of the rather strong and damaging
testimony profferred by a former juror in the domicile trial,
Bonzo and two other longstanding residents. The additional ti
was also requested to permit the Court time to review these
affidavits.

Mrs. Bonzo's testimony in relevant part is recited on pa
lines 1-9 of Appellant's Opening Brief. It was this same tes
for which Appellant made an offer of proof to the trial court
the time of the hearing. The trial court accepted the offer

proof, refused to take the matter under submission to permit the affidavits to be reviewed but agreed to allow the affidavits to be belatedly received. (Item 23, Paragraph 2, Designation of Record on Appeal, Item 8, Respondent's Designation of Record).

Respondent has himself acknowledged the relative importance of these affidavits together with the affidavits of John Rowberry and Ada Thorley by moving first in the District Court to strike the affidavits and secondly, by making a Motion in the Supreme Court to supplement the Record to show the District Court's Order wherein the same affidavits were considered. The Supreme Court on December 5, 1977, however, permitted the affidavits to be considered in this Appeal upon Motion of Appellant notwithstanding the District Court's Order.

It is also of interest to note that when on June 28, 1977, the Motion for a two (2)-week continuance was made and denied, the Court was not even ready to proceed since a jury had not even been summoned by the Clerk, thus necessitating the Court's instruction to the Clerk to call up a jury for the following day. A delay of two (2) weeks, therefore, would have been even less of an imposition on the Court and the county would have afforded counsel for Appellant, in view of all circumstances, to be adequately prepared to meet his burden.

The Court could readily perceive the expense and inconvenience, not to mention the inability to produce certain expert witnesses on such short notice, that would abound in preparing for a trial and bringing all the witnesses from Southern California with a good chance that the trial would never proceed on schedule. Appellant's

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perhaps to their detriment, relied upon the trial court's se
fairness and justice in granting one short continuance in vie
the following events: (1) a short trial notice, (2) a denial
an Interlocutory Appeal the day preceding trial, (3) the deni
a Motion to Stay Proceedings, and (4) a denial of a Motion to
Change the Place of Trial. All were thought to be compelling
reasons for relying on the Court's inherent power to modify it
trial calendar.

Certainly two (2) weeks was not too much to ask when the
Appellant had borne the expense of a year and a half of litiga
untold costs, and had already undergone one trial of a week's
duration and had filed a lengthy Petition for Interlocutory Ap
To deny Appellant at the most crucial time of the litigation,
little time, to finally present his case on the merits in the
possible way, was indeed an abuse of discretion and a denial
due process.

The remaining issues raised by Respondent have been addre
to the satisfaction of Appellant in his Opening Brief. Respon
conclusionary remarks, however, are again wholly inappropriate
this Appeal, finding no support in the Record. Thus labelling
these proceedings a "race to judgment", alluding to Appellant'
"unwillingness" to try the case in Utah, and arguing the Appel
"extreme diligence" in trying this elsewhere, is both unfounde
and irrelevant.

Suffice it to say that Appellant was not willing to forf
constitutional rights to a fair trial before an impartial tr
upon adequate notice. Had Appellant been accorded the cour

a two (2)-week continuance, the trial would have proceeded in Iron County with a full complement of witnesses in a true adversary spirit. And, had the District Court, as requested, moved the trial to an adjoining county, the proceedings would have taken on an even greater dignity without the probability of local bias.

WHEREFORE, Appellant respectfully requests that the judgment and rulings of the trial court be reversed.

DATED: March 28, 1978.

Respectfully submitted,

HIGGS, FLETCHER & MACK

By Thomas E. Miller
Thomas E. Miller, Attorneys for Appellant

DATED: March 28, 1978.

SNOW, CHRISTENSEN & MARTINEAU

By Rex E. Madsen
Rex E. Madsen, Attorneys for Appellant

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Paid By

IN THE FIFTH JUDICIAL DISTRICT COURT IN AND FOR IRON COUNTY, STATE OF UTAH

IN RE: LESTER R. THORLEY, Deceased

JURY TRIAL SETTING

PROBATE NO. 2763

TO: Orville Isom, Hans Q. Chamberlain, Proponents Counsel

Michael J. Park, Thomas E. Miller, Contestants Counsel

YOU AND EACH OF YOU are hereby given Notice that the above entitled matter is hereby set for trial on Wednesday, the 28th day of June, 1977, before a jury for trial on the merits.. You are further required to submit a Trial Brief and Memorandum of Points and Authorities at least five days prior to the date of trial setting forth your respective theory as to burden of proof and degree of proof required on the issue of undue influence and presumptions, if any, that apply.

Purposed Jury Instructions along with authority therefore should be submitted on the morning of trial.

DATED this 17 day of June, 1977.

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I hereby certify that on this 17th day of June, 1977, I mailed a copy of the foregoing AMENDED WRITING to the following: Orville Isom, 78 East Harding Ave. Cedar City, Utah 84720; Hans O. Chamberlain, 110 North Main Street, Cedar City, Utah 84720; Michael J. Park, 110 North Main Street, Cedar City, Utah 84720; Thomas E. Miller, Riggs, Pletcher & Mack, 1800 Home Tower, 707 Broadway, San Diego, California, 92112.

/s/ Willa Sullivan
Secretary